effect that by necessary implication section 64(2) of the Courts of Judicature Act, 1964, operates to prevent the reversal of such order of acquittal regardless of the fact that the judgment of the Federal Court of Appeal has been reversed by the Judicial Committee of the Privy Council. As I am not asked to construe this sub-section but to take it into consideration as a factor which might influence the decision of the Pardons Board, I shall say nothing more about it except to state that the question is hardly relevant to the consideration of the present applications. Nor would it be relevant to consider the additional facts which disclose that formalities for deprivation of citizenship and arrangements for banishment have been completed against the 2nd plaintiff or are in the process of being completed against the 1st plaintiff. These matters will, no doubt, be given the consideration they deserve at the proper time and at the proper place. For the present the decision of this court is that no order is made on either of the two motions, but there will be an order that the costs in each case shall be in the cause.

No order on the motions.

Solicitors: *P. G. Lim; Sim Teow Gok.*

WAI HIN TIN MINING CO. LTD. v. LEE CHOW BENG

[O.C.J. (Chang Min Tat J.) August 29, 1968]
[Ipoh — Civil Suit No. 7 of 1967]

Companies — Loan by company for purchase of company shares — Loan contrary to articles of company and Companies Ordinance, 1940 — Defence not raising illegality — Whether court could take cognisance of illegality — Companies Ordinance, 1940, ss. 47 and 48.

Practice and Procedure — Pleadings — Defence not pleading illegality — Whether court could take cognisance of.

The plaintiffs claimed the repayment of an interest free loan of $2,500 lent by the plaintiffs to the defendant at the latter's request to enable the defendant to purchase shares in the plaintiff company. Evidence of the loan was a general voucher signed by the defendant. The defendant denied the loan and averred that the issue of shares to him was in consideration of services rendered by him to the plaintiff company. As for the voucher the defence was *non est factum*. The defendant did not object to the legality or enforceability of the loan.

Held: (1) on the evidence it was clear that the 2,500 shares were the reward made to the defendant for services rendered to the plaintiff company and the claim should be dismissed on the facts;

(2) the plaintiffs' claim was founded on an illegality as the loan was made from the company's funds in contravention of article 5 of the company's articles of association and certain provisions of the Companies Ordinance. The court could take notice of the illegality although it was not pleaded by the defendant.

Cases referred to:—

(1) *Scott* v. *Brown, Doering, McNab & Co.* [1892] 2 Q.B. 724.

(2) *Gedge & Ors.* v. *Royal Exchange Assurance Corporation* [1900] 2 Q.B. 214.

(3) *R.* v. *Weisz & Anor.* [1951] 2 K.B. 611.

(4) *Holman* v. *Johnson* Cowp. 343.

CIVIL SUIT.

A. Mahendran for the plaintiffs.

G. Moganasundram for the defendant.

Chang Min Tat J.: In this action the plaintiff company claimed for the repayment of an interest-free loan of $2,500 lent by the plaintiff company to the defendant at the latter's request to enable him to pay for the purchase of shares in the same amount in the plaintiff company. Evidence of the loan was a general cash voucher for $2,500 signed by the defendant in acknowledgment. The defendant made a total denial of the loan and averred that the issue of the shares to him was in consideration of the valuable services rendered by him to the plaintiff company. As for the voucher, the defence was *non est factum*. No objection was taken by the defence as to the legality or enforceability of the loan.

The evidence led clearly established that the company was essentially a one-man show, that of Lim Teik Ho, managing director, who initially owned 550 shares of the 600 shares issued. The capital was advanced entirely by him and partly by reason of this or it might be because of ignorance, the only account books kept were (1) a cash book and (2) a ledger. No bank account would appear to have been opened. The actual cash position of the plaintiff company at any one time was the state of the pocket of the managing director and there was never at any time then or subsequently any possibility of checking the payments. A system of acknowledgement by signed vouchers was in use but in the absence of any bank account or proper cash account, the veracity of the vouchers could not of course be ascertained. In this connection, it was pertinent to note that the 9 cash vouchers for alleged payments P.11 A, B & C of allowances for January, 1964, P.11 D, E & F of allowances for February, 1964, and P.11 G, H & I of allowances for March, 1964 in each case paid at the end of the month to Lim Teik Ho, one S. Rasiah and the defendant were serially numbered 12 to 20 — an indication, in my mind, of falsification.

Then, the mine was a new one. Its prospects were a matter of grave uncertainty. The company was a private limited one, in the entire control of one person. Under all these circumstances, for the plaintiff company to assert that anyone would ask to purchase shares in the

company at par without any certainty or even reasonable prospects of gain, and without any possibility of control or even influence in its management would be to establish that the purchaser was a greater gambler than the newcomer to the world of tin-mining was. But that was what the plaintiff company asked the court to believe. The managing director denied that the defendant ever rendered valuable services to him, apart from translating certain letters in English in which language he was unversed. Why he, a resident in Kuala Kangsar should have to come all the way to Ipoh to have this particular defendant, who was after all in his evidence not all that well known to him, remained unexplained, but the sum total of his, Lim Teik Ho's, evidence was that the only services rendered by the defendant to him were as such translator. His witness, S. Rasiah, a hench-man whose personal interests were dependent on the favour of Lim Teik Ho, however went further and admitted that the defendant accompanied him in the purchase of mining equipment for the company. Again why the defendant should be required to accompany this witness in such purchase remained unexplained as was the discrepancy between the evidence of S. Rasiah and that of Lim Teik Ho. Further his evidence that the payment of the allowances on the vouchers were paid also to the defendant merely deepened the mystery. Even as a favour, it was a gross over-payment to pay $300 a month for merely translating a few letters.

The truth of the matter lay in the acquisition of the mining land by Lim Teik Ho. Lim Teik Ho testified that he obtained the information about this piece of land from 2 or 3 members of the staff of the land office over coffee. He did not know their names, as they were only acquaintances. Now knowledge of the availability of mining lands was a prerequisite to application for them and was very very valuable. It was common ground that this particular piece of land was under lease to Ulu Piah Tin Mining Co. Ltd. of which M/s Hannay & Steedman were the consultants. The lease was about to expire and the land was, at the expiry of the lease, open to application. A certain Chan Peng Kong who subsequently worked for the plaintiff company as a mines supervisor, had formerly worked for M/s Hannay & Steedman as a boring clerk. He was called as a witness for the defendant and he testified that he gave a tracing of this land to the defendant. It was clear despite this witness's protestation of innocence that such information should not have been divulged, but obviously he had access to this information and between the choice of the plaintiff's evidence and the defendant's, I had no hesitation in all the circumstances of the case to prefer the defendant's as being the truth. To my mind therefore, if in fact, as I had so found, the defendant had obtained the information of this land for the plaintiff, he had performed valuable services to the plaintiff by introducing him to the lucrative, if somewhat uncertain, world of tin-mining. Accordingly I accepted his evidence that the 2,500 shares were the reward for his services, and in my view, the plaintiff's claim must stand dismissed on the facts as found by me.

However, in the course of the trial, it occurred to me that the whole action by the plaintiff company was based on an illegality. Though no money passed and the shares were issued in the name of the defendant in exchange for his work, the defendant stood in the books of the company indebted to the company in the nominal value of the shares. The transaction was by its nature on the plaintiff company's own allegation, a loan from the company's funds to purchase the company's shares. This was clearly in violation of article 5 of the plaintiff company's Articles of Association, which read as follows:—

"5. The funds of the company or any part thereof shall not be employed in purchase of or by way of loan upon shares of the company."

It was also in breach of section 47 and section 48 of the Companies Ordinance No. 49 of 1940:—

"47. None of the funds of any company shall be employed in the purchase of, or lent on, shares of the company, and the company shall not, except as authorised by the next following section of this Ordinance give any financial assistance for the purpose of or in connection with any purchase of shares in the company.

48. (1) Subject as provided in this section, it shall not be lawful for a company to give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase made or to be made by any person of any shares in the company:

Provided that nothing in this section shall be taken to prohibit —

(a) where the lending of money is part of the ordinary business of a company, the lending of money by the company in the ordinary course of its business;

(b) the provision by a company, in accordance with any scheme for the time being in force, of money for the purchase by trustees of fully paid shares in the company to be held by or for the benefit of employees of the company, including any director holding a salaried employment or office in the company;

(c) the making by a company of loans to persons, other than directors, *bona fide* in the employment of the company with a view to enabling those persons to purchase fully paid shares in the company to be held by themselves by way of beneficial ownership.

(2) The aggregate amount of any outstanding loans made under the authority of provisos (b) and (c) to subsection (1) of this section shall be shown as a separate item in every balance sheet of the company.

(3) If a company acts in contravention of this section, the company and every officer of the company who is in default shall be liable to a fine not exceeding two thousand dollars."

Clearly, the plaintiff company did not come within any of the exceptions in section 48 and its action was unlawful. It was however submitted to me that the action was saved by the subsection (4) of section 67 of the Companies Act No. 79 of 1965. Section 67 of the Companies Act, 1965 substantially re-enacted the provisions of sections 47 and 48 of the repealed Ordinance but had a new subsection (4) which was in these terms:—

"(4) Nothing in this section shall operate to prevent the company from recovering the amount of any loan made in contravention of this section or any amount for which it becomes liable on account of any financial assistance given in contravention of the provisons of this section."

There was no such saving clause in the repealed Ordinance. Now the Companies Act, 1965 was brought into force on 15th April, 1966, i.e. before the institution of the action herein but I was of the opinion and I so held that by combined effect of section 3(2)(b) of the Companies Act:—

"(2) Unless the contrary intention appears in this Act —

(a) .....

(b) in particular and without affecting the generality of the foregoing paragraph, such repeal shall not not disturb the continuity of status operation or effect of any Order in Council order rule regulation scale of fees appointment conveyance mortgage deed agreement resolution direction instrument document memorandum articles incorporation nomination affidavit call forfeiture minute assignment register registration transfer list licence certificate security notice compromise arrangement right priority liability duty obligation proceeding matter or thing made done effected given issued passed taken validated entered into executed lodged accrued incurred existing pending or acquired by or under any of such written laws before the commencement of this Act."

and section 13 of the Interpretation and General Clauses Ordinance, 1948 (now section 30 of the Interpretation Act, 1967), the law applicable was that of the Companies Ordinance, 1946.

On the question whether in the absence of any specific defence on the ground of illegality and since by O. 19 r. 20 of the Rules of the Supreme Court a bare denial of *non est factum* did not operate as a denial of the legality of the transaction, I could take cognisance of such illegality, I thought the law, on the authority of *Scott* v. *Brown, Doering, McNab & Co.*,[1] *Gedge & Ors.* v. *Royal Exchange Assurance Corporation* [2] and *R.* v. *Weisz & Anor.*[3] was clear that in some cases the court would itself take notice of the illegality of the contract in which the plaintiff was suing if it appeared on the face of the contract and from the evidence brought before it by either party, although the defendant had not pleaded the illegality. It would suffice to refer to the first-mentioned case of *Scott* v. *Brown, Doering, McNab & Co.*, a case concerning an agreement between the plaintiff and McNab one of the defendants for McNab to use the plaintiff's money to purchase shares in a projected company, in an indictable conspiracy to induce the public to believe that there was a real market for the shares and that they were at a real premium, whereas in truth and in fact, as the plaintiff and McNab well knew, they were not. On appeal, A. L. Smith L.J. (as he then was) had this to say:—

"In my opinion, the maxim *In pari delicto potior est conditio possidentis* applies, and this court ought not to assist the plaintiff when he seeks to recover the £632. 3s. 5d. back from the defendants. Upon these grounds, and without going further into the case, the appeal must be dismissed, and with costs."

Lindley L.J. (as he then was), with respect, put it more succinctly in these words:—

"*Ex turpi causa non oritur actio.* This old and well-known legal maxim is founded in good sense, and expresses a clear and well-recognised legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him. If authority is wanted for this proposition, it will be found in the well-known judgment of Lord Mansfield in *Holman* v. *Johnson*." [4]

For those reasons, I dismissed the plaintiff's claim as one founded on an illegality but in the event of my being held to be wrong, came to the findings of fact on the evidence adduced that there was no loan made by the plaintiff company to the defendant and that the 2,500 shares were issued to the defendant in consideration of valuable services rendered by the defendant to Lim Teik Ho and the plaintiff company. I also awarded costs to the defendant.

Claim dismissed.

Solicitors: *Mahendran & Co.; Yeoh Kian Teik & Co.*

LING HOW DOONG v. THE ATTORNEY-GENERAL, SINGAPORE

[O.C.J. (Winslow J.) September 18, 1968]
[Singapore — Suit No. 275 of 1967]

Constitutional Law — Police Force — Disciplinary action — Public Service Commission — Enhancing of sentence — Revisional jurisdiction — Disciplinary Board — Judicial or quasi-judicial — Supervisory jurisdiction — Constitution of Malaysia, arts. 135(2) and 140(1) — Whether two hearings or one — Conflict between Ordinance and Constitution — Police Force Ordinance, 1958, s. 28(2).